No. 98-149

Supreme Court, U.S.
FILED
MAR 24 1999
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

COLLEGE SAVINGS BANK,
Petitioner,

v.

FLORIDA PREPAID POSTSECONDARY
EDUCATION EXPENSE BOARD,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit**

BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* SUPPORTING RESPONDENT

RICHARD RUDA *
Chief Counsel
JAMES I. CROWLEY
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 345
Washington, D.C. 20001
(202) 434-4850
* Counsel of Record for the
Amici Curiae

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QUESTION PRESENTED

Amici will address the following question:

Whether Florida impliedly waived its Eleventh Amendment immunity from suit in federal court by operating a prepaid tuition program.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county and municipal governments and officials throughout the United States.[1] *Amici* have a com-

[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief *amicus curiae*. Their letters of consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amici* or their members, made a monetary contribution to the preparation or submission of this brief.

pelling interest in legal issues that affect state and local governments.

The Eleventh Amendment is one of the principal constitutional protections of state sovereignty. It confirms that "each State is a sovereign entity in our federal system" and that "'[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.'" *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54 (1996) (citations omitted). This Court has held that "[a] sovereign's immunity may be waived" but has "insisted . . . that the State's consent be unequivocally expressed." *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984). The Court's longstanding "reluctance to infer that a State's immunity from suit in the federal courts has been negated stems from recognition of the vital role of the doctrine of sovereign immunity in our federal system." *Id.*

In the face of these fundamental principles of constitutional federalism, petitioner College Savings Bank and the United States nonetheless urge this Court to hold that States can "impliedly" waive their Eleventh Amendment immunity and that the state agency in this case has done so. *Amici* believe that acceptance of these erroneous contentions by this Court would "upset[] 'the fundamental constitutional balance between the Federal Government and the States,' placing a considerable strain on '"the principles of federalism that inform Eleventh Amendment doctrine."'" *Dellmuth v. Muth*, 491 U.S. 223, 227 (1989) (citations omitted). *Amici* therefore submit this brief to assist the Court in its resolution of this case.

STATEMENT

1. "Since the end of World War II, providing financial access to college for all who can benefit from it has been one of the nation's primary goals." Jerry S. Davis, *College Affordability: A Closer Look At The Crisis* 3 (Sallie Mae Education Institute, 1997). The widening difference in earnings between "those with college degrees and those without them" has made attending college steadily more important, yet "rising college costs have caused many parents to worry that the education they consider vital to their children's success and well-being is becoming affordable only to the wealthy." *Id. See also* Lily Eng & Karen Heller, "For Many, College Is Slipping Out of Reach; Soaring Costs Are Closing Doors for the Middle Class," *Philadelphia Inquirer*, Apr. 1, 1996, at A1 ("Many American families . . . are angered and frustrated by the cost of attending college, which has accelerated at more than twice the rate of inflation for the last 15 years.").

Several factors contributed to the development of this serious national problem. Chief among these was the substantial increase in college costs, which from 1980 to 1987 rose an average of 8.8 percent annually, nearly twice the rate of inflation and far exceeding the 5.6 percent growth rate of median family income. U.S. General Accounting Office, *College Savings: Information on State Tuition Prepayment Programs* 12 (Aug. 1995) ("GAO Report"). Contributing to the crisis was the fact that from 1980 to 1987 federal student aid decreased on an inflation-adjusted basis, *id.* at 13-14, and student aid packages reduced the amount of outright grants in favor of increased loans, with the result that "student debt increased

60 percent between 1980 and 1987." *Id.* at 14.[2] These developments made it "apparent that fewer families would be able to finance higher education out of current income while their children were enrolled in college" and that planning and saving for future college education was essential. *Id.*

2. The GAO Report describes the governmental reaction in the mid-1980s to these increasing concerns "about the future ability of average American families to afford a college education for their children." *Id.* at 12. "In response," the GAO report continues, "both state and federal government officials sought ways to encourage and help families to save for college." *Id.* "One innovative approach . . . allows people to pay roughly current prices for tuition at participating colleges in exchange for a guarantee that a child's future tuition bill at one of these institutions will be covered, no matter how high costs rise. These programs are known as tuition prepayment programs." *Id.*

The Michigan Education Trust (MET), created by an act of the Michigan legislature and signed into law by the governor on December 23, 1986, was the first state prepaid tuition program. *See Michigan v. United States*, 40 F.3d 817, 818 (6th Cir. 1994) (citing M.C.L.A. 390.1421 *et seq.*). The Florida legislature followed in 1987, *see* Fla. Stat. § 240.551,

[2] The trend of college costs increasing at rates greater than inflation has continued in the 1990s. GAO Report at 12. Between 1990 and 1996 the "total cost of attending private colleges and universities [grew] 95 percent" and "[t]otal costs for attending public institutions have gone up by 82 percent." National Association of State Treasurers, College Savings Plans Network, *Special Report on State College Savings Plans* 1 (1996) (citation omitted) (*"State College Savings Plans"*).

Ohio in 1989, *see* O.R.C. § 3334.02, Alabama in 1990, *see* Ala. Code § 16-33C-6, Alaska in 1991, *see* Alaska Stat. § 14.40.803, and Pennsylvania in 1992, *see* 24 Pa. Cons. Stat. § 6901.101. *See generally State College Savings Plans* at 8.

The Michigan program was revolutionary. It received "a great deal of attention nationwide, both in other states and the popular press; in fact, the enactment of MET has been called 'the most widely publicized government action in the field of higher education finance during the 1980s.'" *GAO Report* at 15 (citation omitted). "Soon, programs similar to MET were under consideration in as many as 40 states." *Id.* As the litigation between the State of Michigan and the Internal Revenue Service demonstrates, however, "[t]he most serious issue facing state tuition prepayment programs" was "the potential applicability of federal tax provisions." *Id.* at 93.

3. Two key developments eliminated the obstacles to state tuition prepayment programs posed by unfavorable federal tax treatment of the plans and opened the door to the creation of such plans by increasing numbers of States. One was that the Sixth Circuit ruled in favor of the State of Michigan in its litigation with the Internal Revenue Service. *See Michigan v. United States*, 40 F.3d at 825-29 (holding that investment income from MET was not subject to federal income taxation). In the course of holding that MET's investment income was not taxable by the federal government, the court of appeals explained:

> [W]e think it obvious that encouraging higher education by helping provide the means for attendance at Michigan's public colleges and universities—the basic function for which the education trust was established by the Michigan legisla-

> ture—is at least as much a 'public function' as building and operating bridges and tunnels. *See Brown v. Bd. of Education*, 347 U.S. 483, 493 (1954), where the Supreme Court said that "education is perhaps the most important function of state and local governments."

40 F.3d at 825.

The other major development was that Congress, in the mid-1990s, enacted a number of changes in the tax code that encouraged the development of state pre-paid tuition plans. The first such enactment was § 1806 of the Small Business Job Protection Act of 1996, P.L. 104-188. *See* Patrick Healy, "U.S. Gives States Nod on Prepaid-Tuition Plans," *Chronicle of Higher Education*, Sept. 6, 1996, at A60.

Section 1806 provides that a "qualified State tuition program," defined as "a program established and maintained by a State or agency or instrumentality thereof," shall be "exempt from taxation." 110 Stat. 1895. The Senate Report accompanying this legislation set forth its purpose: "to clarify the tax treatment of State-sponsored prepaid tuition and educational savings programs in order to encourage persons to save to meet post-secondary educational expenses." S. Rep. No. 281, 104th Cong., 2d Sess. 106 (1996), *reprinted in* 1996 U.S.C.C.A.N. 1474, 1580.

Further favorable federal tax treatment followed the next year in the Taxpayer Relief Act of 1997, P.L. 105-34, which extends the federal tax exemption for state prepaid tuition programs to the costs of room and board. *See* P.L. 105-34, § 211, 111 Stat. 810; Kristin D. Conklin, *Federal Tuition Tax Credits And State Higher Education Policy: A Guide for*

State Policy Makers 3 (National Center for Public Policy and Higher Education, 1998).[3]

4. The cumulative result of the college affordability crisis and the state and federal response is that today more than 40 States have adopted a variety of measures to address this matter of pressing national concern. *See id.* at 26-27 (Table 7). Of these, 22 States have established prepaid tuition programs. *See id.*; *see also* Appendix. Indeed, 47 States have now either established or are seriously considering the establishment of a state program to enable their citizens to prepay tuition or save for college. *See* Conklin, *Federal Tuition Tax Credits* at 26-27 (Table 7).

As noted above, Florida was among the pioneers in responding to the college affordability crisis. The State enacted its prepaid tuition program in 1987, five years before Congress passed the Trademark Remedy Clarification Act. Florida offers plans covering tuition for up to four years at a public university, two years at a community college, or two years at a community college and two at a public university, as well as a plan covering dormitory fees. *See* Fla. Stat. § 240.551. As of 1996, 375,546 tuition and dormitory fee contracts had been purchased and 18,000 students had utilized benefits. *State College Savings Plans* at 11.

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[3] State prepaid tuition programs are also supported by the Executive branch. Describing the importance of state prepaid tuition plans as a means of responding to parents' anxiety about college tuition, David A. Longanecker, U.S. Assistant Secretary of Education for Postsecondary Education, has said, "I'm glad we have the plans. I'm sorry we need them." *N.Y. Times*, "Tuition Prepayment Gains Favor as College Costs Skyrocket," Aug. 21, 1996, at B7.

SUMMARY OF ARGUMENT

A. The Court should overrule its holding in *Parden v. Terminal Ry. of Ala. Docks*, 377 U.S. 184 (1964), that a State can "impliedly consent" to suit in federal court. Neither that holding nor the premises that supported it can be reconciled with the Court's Eleventh Amendment jurisprudence.

1. The holding of *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996)—that Congress lacks the power to abrogate the States' Eleventh Amendment immunity when legislating pursuant to the Commerce Clause—is fatal to the contention that a State can impliedly consent to suit in federal court under a Commerce Clause enactment. "Abrogation" and "waiver" are so closely related that, as the Court has held, congressional intent to abrogate is the "necessary predicate" for the doctrine of implied waiver of Eleventh Amendment immunity. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 451-52 (1976). Even if Congress could intend to abrogate the States' immunity when legislating under its commerce power, a State cannot be held to have impliedly waived its immunity as a result of such an enactment. *See Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 42-44 (1989) (Scalia, J., dissenting). Therefore, where, as here, Congress lacks the power to abrogate, it lacks power to condition the States' ability to engage in conduct on their "implied waiver" of immunity.

2. The notion that a State can "impliedly" waive its sovereign immunity is irreconcilable with the Court's many "clear statement" cases. These cases hold not only that Congress must state its intent to abrogate clearly and unequivocally, but that a State will be held to have waived its Eleventh Amendment immunity only if that waiver is clearly and unequivocally expressed. "[T]he salient point" is that the Court must have "perfect confidence" that a State's immunity is to be negated; "imperfect confidence will not suffice given the special constitutional concerns in this area." *Dellmuth v. Muth*, 491 U.S. 223, 231 (1989). As the Court put it in *Edelman v. Jordan*, 415 U.S. 651, 673 (1974), "Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights, and we see no place for it here."

3. In the course of overruling *Union Gas*, the *Seminole* Court analyzed a number of additional factors that supported its decision. *See* 517 U.S. at 63-66. The same factors support overruling *Parden*. They include the fact that the Court has never subsequently found an implied waiver of state sovereign immunity and has narrowed or distinguished *Parden* in each subsequent case in which it has been considered, that *Parden* has sown confusion in the lower courts and, most significantly, that *Parden* is grounded on a one-sided view of the federal-state balance that the Court has repeatedly rejected.

B. Even if the Court concludes that *Parden* is still good law, Florida Prepaid has not impliedly waived Florida's sovereign immunity. *Amici* agree with Florida Prepaid that it is "engaged in an important governmental function; therefore, the *Parden* doctrine of waiver does not apply" to it. Pet. App. 22a.

Florida Prepaid should prevail even if the Court does not reach this issue, however. *Parden* itself makes clear that a State does not impliedly consent to suit when it continues to engage in an activity after Congress expresses its intent that States be subject to suit. The federal statute at issue in *Parden*, the FELA, had been enacted in 1908; twenty years later Alabama commenced the operation of a rail-

road. *Parden* held "simply that Alabama, when it began operation of an interstate railroad approximately 20 years after enactment of the FELA, necessarily consented to such suit as was authorized by that Act." 377 U.S. at 192. As Justice Marshall later explained, "To suggest that the State had the choice of either ceasing operation of . . . vital public services or 'consenting' to federal suit suffices . . . to demonstrate that the State had no true choice at all and thereby that the State did not voluntarily consent to the exercise of federal jurisdiction in this case." *Employees of the Dept. of Public Health & Welfare v. Dept. of Public Health & Welfare*, 411 U.S. 279, 296 (1973) (Marshall, J., concurring in the result).

The state agency in this case was created by the Florida Legislature in 1987 and commenced operations in 1988. Congress did not subject the States to suit under the Lanham Act until 1992. Consequently, Florida Prepaid's failure to terminate its programs following Congress' decision to subject States to suit cannot be deemed an implied waiver of Florida's Eleventh Amendment immunity.

ARGUMENT

FLORIDA PREPAID DID NOT IMPLIEDLY WAIVE FLORIDA'S ELEVENTH AMENDMENT IMMUNITY FROM SUIT IN FEDERAL COURT

A. The *Parden* "Implied Consent" Holding Has Not Survived This Court's Subsequent Decisions And Should Be Expressly Overruled

In *Parden v. Terminal Ry. of Ala. Docks Dept.*, 377 U.S. 184, 192 (1964), this Court held that the State of Alabama, "when it began operation of an interstate railroad approximately 20 years after enactment of the FELA, necessarily consented to such suit as was authorized by that Act." Two core premises underlay the Court's ruling. The first was that the broad language of the FELA adequately expressed Congress' intent to subject States to suit in federal court. *See id.* at 188-90. The second was that Congress was empowered to abrogate the States' Eleventh Amendment immunity when legislating pursuant to the Commerce Clause. *See id.* at 190-92. With respect to this latter point, the *Parden* Court reasoned that "the States necessarily surrendered any portion of their sovereignty that would stand in the way of [Commerce Clause] regulation." *Id.* at 192.

Neither *Parden*'s holding that a State can "impliedly" consent to suit in federal court, nor the premises that were the predicate for that holding, can be reconciled with the Court's Eleventh Amendment jurisprudence. As Justice Kennedy noted just last Term, "the Court's recent cases have disfavored constructive waivers of the Eleventh Amendment and have required the State's consent to suit to be unequivocal." *Wisconsin Dept. of Corrections v. Schacht*, 118 S.Ct. 2047, 2057 (1998) (Kennedy, J., concurring).

As for the premises of *Parden*'s holding, *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), puts to rest the notion that Congress can abrogate the States' Eleventh Amendment immunity when legislating pursuant to its commerce power. In addition, a long line of cases leaves no doubt that "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985).

Both the holding and the reasoning of *Parden* are thus irreconcilable with this Court's Eleventh Amend-

ment jurisprudence. Congress lacks power to abrogate the States' immunity when legislating under its commerce power, and the notion of "implied consent" is antithetical to the Eleventh Amendment "clear statement" rule. *Amici* therefore respectfully urge the Court to expressly overrule *Parden*.

1. *Because Congress Lacks Power To Abrogate When Legislating Pursuant To Its Commerce Power, A State Cannot "Impliedly Consent" To Suit Under A Commerce Clause Enactment*

Seminole Tribe's holding that Congress lacks the power to abrogate when legislating pursuant to the Commerce Clause is alone fatal to the contention that Florida Prepaid could consent to suit in this case. Abrogation and waiver are integrally related concepts; indeed, they are two sides of the same coin. They are so closely related that Congress' intent to abrogate is, as this Court has held, a necessary predicate for the States' waiver of their constitutional immunity. Even if Congress could intend to abrogate when legislating under its commerce power, States cannot impliedly consent to suit under Commerce Clause enactments such as the Lanham Act.[4]

[4] *Amici* agree with respondent and the United States that a state agency that allegedly "engages in false and misleading advertising of its own product does not thereby 'deprive' a competitor of 'property' within the meaning of the Fourteenth Amendment, even if the competitor suffers pecuniary harm." U.S. Br. 30-31; Respondent's Br. 7-17. *Amici* therefore treat petitioner's Lanham Act allegations as raising constitutional issues only under the Commerce Clause, and not under § 5 of the Fourteenth Amendment.

Amici submit that College Savings Bank's § 5 arguments with respect to the Lanham Act are even weaker than those with respect to the Patent Act. *See* Br. *Am. Cur.* National Conference of State Legislatures *et al., Florida Prepaid Post-secondary Education Expense Board v. College Savings Bank* (No. 98-531), at 11-23 (filed Feb. 22, 1999).

In *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), this Court expressly acknowledged the interconnectedness of intent to abrogate and the implied waiver doctrine. In *Fitzpatrick*, the Court explained its holding in *Edelman v. Jordan*, 415 U.S. 651 (1974), as follows:

> In *Edelman* this Court held that monetary relief awarded by the District Court . . . violated the Eleventh Amendment. . . .
>
> *Edelman* went on to hold that the plaintiffs in that case could not avail themselves of the doctrine of waiver expounded in cases such as *Parden v. Terminal R. Co.*, 377 U.S. 184 (1964), and *Employees v. Missouri Public Health Dept.*, 411 U.S. 279 (1973), because the necessary predicate for that doctrine was congressional intent to abrogate the immunity conferred by the Eleventh Amendment.

427 U.S. at 451-52. The Court thus made clear that there can be no implied waiver of sovereign immunity by the States unless Congress intends to abrogate that immunity.

This point was later amplified by Justice Scalia in his dissenting opinion in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 29-45 (1989). Justice Scalia questioned, in light of his view that Congress could not abrogate the States' immunity when legislating under its Article I powers, "the continuing validity of *Parden*'s holding" as to Congress' authority to elicit the States' implied consent to suit. *Id.* at 43. "There are," he wrote, "obvious and fatal difficulties in acknowledging such a power if no Commerce Clause power to abrogate state sovereign immunity exists." *Id.* at 43. Given the fact that "*all* federal

prescriptions are . . . in a sense conditional," all "can be redescribed as invitations to 'waiver'. . . . in exchange for federal permission to engage in that activity." *Id.* at 43-44.

Consequently, "to acknowledge that the Federal Government can make the waiver of state sovereign immunity a condition to the State's action in a field that Congress has authority to regulate is substantially the same as acknowledging that the Federal Government can eliminate state sovereign immunity in the exercise of its Article I powers." *Id.* at 44. Justice Scalia thus reiterated the holding of *Edelman* that when Congress lacks the power to abrogate, it necessarily lacks power to condition the States' ability to engage in conduct on their "implied waiver" of immunity.

Indeed, even *Parden* itself rested on the view that when Congress legislates under the Commerce Clause, congressional power to abrogate is an essential prerequisite to a State's implied waiver of immunity. *Parden* based its holding that Alabama had impliedly consented to suit on "the State's commission of an act to which Congress, in the exercise of its constitutional power to regulate commerce, has attached the condition of amenability to suit." 377 U.S. at 195. *See also Welch v. Texas Dept. of Highways*, 483 U.S. 468, 476 (1987) (*Parden*'s holding that Alabama had waived immunity was based on reasoning that in the FELA "Congress evidenced an intention to abrogate Eleventh Amendment immunity").

Because the Lanham Act was enacted pursuant to Congress' power to regulate interstate commerce, Congress lacked the power to abrogate the States' Eleventh Amendment immunity. Even if Congress could intend to abrogate when legislating under its

commerce power, a State cannot be held to have impliedly consented to suit as a result of such an enactment. Consequently, there can be no implied waiver by Florida Prepaid as a result of engaging in conduct regulated by the Lanham Act.

2. *"Implied Consent" To Suit Is Irreconcilable With The Clear Statement Rule and Its Purpose of Preserving the Federal-State Balance*

The Eleventh Amendment decisions of this Court since *Parden* firmly establish not only that Congress must state its intent to abrogate clearly and unequivocally, but also that States will be held to have waived their Eleventh Amendment immunity only if that waiver is clearly and unequivocally expressed. This stringent test is mandated by the vital role of the Eleventh Amendment in preserving the state-federal balance.

With respect to abrogation, the Court has held,

> "To temper Congress' acknowledged powers of abrogation with due concern for the Eleventh Amendment's role as an essential component of our constitutional structure, we have applied a simple but stringent test: 'Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.' "

Seminole Tribe, 517 U.S. at 56 (quoting *Dellmuth v. Muth*, 491 U.S. 223, 227-28 (1989)). *See also Atascadero*, 473 U.S. at 242. Likewise with respect to waiver,

> A sovereign's immunity may be waived, and the Court consistently has held that a State may consent to suit against it in federal court. We have insisted, however, that the State's consent

> be unequivocally expressed. . . . Our reluctance to infer that a State's immunity from suit in the federal courts has been negated stems from recognition of the vital role of the doctrine of sovereign immunity in our federal system.

Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 99 (1984) (citations omitted). "[T]he salient point" is that the Court must have "perfect confidence" that a State's immunity is to be negated; "imperfect confidence will not suffice given the special constitutional concerns in this area." *Dellmuth*, 491 U.S. at 231.

This clear statement rule is a corollary of the broader principle of constitutional law that the Court "do[es] not presume acquiescence in the loss of fundamental rights." *Ohio Bell Tel. Co. v. Public Util. Comm'n*, 301 U.S. 292, 307 (1937). The classic formulation of this rule is in *Johnson v. Zerbst*: "[C]ourts indulge every reasonable presumption against waiver of fundamental rights. . . . A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." 304 U.S. 458, 464 (1938) (internal quotation omitted).

Nor is there any question that "[a] state's freedom from litigation was established as a constitutional right through the Eleventh Amendment." *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 51 (1944) (emphasis added). Indeed, the majority opinion in *Parden*, as well as the dissent, acknowledged that the States' Eleventh Amendment immunity is a "right." *See* 377 U.S. at 193; *id.* at 200 (White, J., dissenting) ("Congress' failure to bring home to the State the precise nature of its option makes impossible the 'intentional relinquishment . . . of a known right or privilege' which must be shown

before constitutional rights may be taken to have been waived.") (quoting *Johnson*, 304 U.S. at 464).

Consequently, the Court has repeatedly shown great reluctance to infer that a State has impliedly waived its constitutional right to be free from suit in federal court. In *Edelman*, for example, the Court reasoned:

> Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights, and we see no place for it here. In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction."

415 U.S. at 673 (citation omitted). The *Edelman* Court reaffirmed that " 'when we are dealing with the sovereign exemption from judicial interference in the vital field of financial administration a clear declaration of the state's intention to submit its fiscal problems to other courts than those of its own creation must be found.' " *Id.* (quoting *Great Northern Life*, 322 U.S. at 54). *See also Welch*, 483 U.S. at 473; *id.* at 477 (" 'It should not be easily inferred that Congress, in legislating pursuant to one article of the Constitution, intended to effect an automatic and compulsory waiver of rights arising under another.' ") (quoting *Parden*, 377 U.S. at 198 (White, J., dissenting)).

Amici respectfully submit that *Parden*'s holding that the State of Alabama had "impliedly consented" to suit in federal court is flatly irreconcilable with the reasoning and holdings of the foregoing cases. Indeed, the above-quoted language from *Edelman* can fairly be read as overruling *Parden*'s holding that a State's entry into a federally regulated activity con-

stitutes an implied waiver of the State's sovereign immunity. *See Florida Dept. of Health & Human Servs. v. Florida Nursing Home Ass'n*, 450 U.S. 147, 150 (1981) (per curiam). Insofar as that view of *Edelman* is not adopted, *amici* submit that the Court should use this case to expressly overrule *Parden*.

The overruling of *Parden* is called for not only by the Court's Eleventh Amendment jurisprudence but also by the unbroken line of cases holding that the sovereign immunity of the United States cannot be impliedly waived. "It is elementary that '[t]he United States, as sovereign, is immune from suit save as it consents to be sued'. . . . A waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'" *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941), and *United States v. King*, 395 U.S. 1, 4 (1969)). *See also United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-34 (1992). As far as the sovereign immunity of the United States is concerned, "waiver of sovereign immunity is accomplished not by a 'ritualistic formula'; rather intent to waive immunity and the scope of such a waiver can only be ascertained by reference to underlying congressional policy." *Franchise Tax Bd. of Cal. v. U.S. Postal Service*, 467 U.S. 512, 521 (1984) (citation omitted).

"[T]he doctrine of sovereign immunity, for States as well as for the Federal Government, was part of the understood background against which the Constitution was adopted, and which its jurisdictional provisions did not mean to sweep away." *Union Gas*, 491 U.S. at 31-32 (Scalia, J., dissenting). Given this parity, there is no basis for treating the States' sovereign immunity any less respectfully than that of

their federal co-sovereign. The United States cannot impliedly waive its sovereign immunity. The same rule should apply to the States. The Court should eliminate all doubt on this important issue of federalism by expressly overruling *Parden*.

3. *Numerous Other Factors Favor Overruling* Parden

In *Seminole Tribe* the Court analyzed numerous factors in the course of concluding that *Union Gas* ought to be overruled. *See Seminole Tribe*, 517 U.S. at 63-66. An examination of these factors in this case reinforces the conclusion that *Parden* should likewise be overruled.

Not only was *Parden* a 5-4 decision, but it is a true outlier. "[T]he Court's recent cases have disfavored constructive waivers of the Eleventh Amendment and have required the State's consent to suit to be unequivocal." *Schacht*, 118 S.Ct. at 2057 (Kennedy, J., concurring). Indeed, since *Parden* the Court has never subsequently found "implied consent" to suit in federal court; all post-*Parden* cases in which a State was alleged to have impliedly consented to suit have narrowed or distinguished *Parden*. *See Employees of the Dept. of Public Health & Welfare v. Dept. of Health & Welfare*, 411 U.S. 279, 285 (1973); *Edelman*, 415 U.S. at 672-74; *Florida Dept. of Health*, 450 U.S. at 150; *Atascadero*, 473 U.S. at 238-39.[5]

Because *Parden* is a constitutional ruling, it is a more appropriate candidate for overruling than a

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[5] In *Welch*, of course, the Court expressly held that "to the extent that *Parden* . . . is inconsistent with the requirement that an abrogation of Eleventh Amendment immunity by Congress must be expressed in unmistakably clear language, it is overruled." 483 U.S. at 478.

statutory decision, because "correction through legislative action is practically impossible." *Edelman*, 415 U.S. at 671 n.14 (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting)); *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). Moreover, as Justice Brennan, the author of the *Parden* opinion, himself later acknowledged, the *Parden* holding is "perhaps not unambiguously phrased." *Employees*, 411 U.S. at 301 (Brennan, J., dissenting). This ambiguity caused considerable confusion in the lower courts in the years immediately following *Parden*.[6] The inability of the lower courts to discern a workable standard for implied waiver in the *Parden* opinion continues up to the present day.[7]

Last and most important, the evolution of the Court's Eleventh Amendment jurisprudence since *Parden* conclusively demonstrates that *Parden* is grounded on a one-sided view of the federal-state balance that has been rejected by this Court. *See* 377

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[6] According to one commentator reviewing the first post-*Parden* decade,

> It quickly became evident that in announcing its new implied waiver doctrine the *Parden* Court had failed to provide adequate standards to guide the lower courts in subsequent cases. The central problem has been the ambiguity inherent in the Court's approach.

Rick Claybrook, Comment, *Implied Waiver of a State's Eleventh Amendment Immunity*, 1974 Duke L.J. 925, 932. *See also id.* at 938 (collecting cases).

[7] *Compare Digiore v. Illinois*, 962 F.Supp. 1064, 1074-76 (N.D. Ill. 1997) (State's continued provision of police services following application of FLSA to States is not implied consent to suit) *with Carey v. White*, 407 F.Supp. 121, 124-25 (D. Del. 1976) (State's continued operation of psychiatric hospitals following application of FLSA to States constitutes implied consent to suit).

U.S. at 196. In the view of the *Parden* majority, "when a State leaves the sphere that is exclusively its own and enters activities subject to congressional regulation, it subjects itself to that regulation as fully as if it were a private person or corporation." *Id.* The *Parden* Court further reasoned that where, as in the FELA, "Congress by the terms and purposes of its enactment has given no indication that it desires to be . . . hindered in the exercise of its constitutional power, we see nothing in the Constitution to obstruct its will." *Id.* at 198.

The first of these premises—that the States are no different than any other subject of federal regulation—was rejected by the Court nine years later in *Employees*: "Recalcitrant private employers may be whipped into line. . . . But we are reluctant to believe that Congress in pursuit of a harmonious federalism desired to treat the States so harshly." 411 U.S. at 286. *See also Welch*, 483 U.S. at 475 ("the Eleventh Amendment marks a constitutional distinction between the States and other employers of seamen"). The second—that the scope of Congress' regulatory authority is subject only to those limits imposed by Congress itself—has repeatedly been refuted by the Court. *See, e.g., City of Boerne v. Flores*, 521 U.S. 507 (1997); *United States v. Lopez*, 514 U.S. 549 (1995); *New York v. United States*, 505 U.S. 144 (1992).

In short, for the same reasons that *Seminole Tribe* held that "none of the policies underlying *stare decisis* require[d] [the Court's] continuing adherence" to the holding in *Union Gas*, 517 U.S. at 66, the Court should expressly overrule *Parden*:

> The decision has, since its issuance, been of questionable precedential value. . . . The case

> involved the interpretation of the Constitution, . . . [and] both the result . . . and the . . . rationale depart from our established understanding of the Eleventh Amendment and undermine the accepted function of Article III.

Id. *Amici* respectfully submit that in this case, as in *Seminole Tribe*, the Court should "feel bound to conclude that [*Parden*] was wrongly decided and that it should be . . . overruled." *See id.*

B. If *Parden*'s Implied Consent Holding Is Still Good Law, A State Does Not Impliedly Waive Its Eleventh Amendment Immunity By Continuing To Engage In An Activity After Congress Renders States Subject To Suit

Even if the Court concludes that *Parden*'s implied consent holding is still good law, Florida Prepaid has not impliedly waived the State's Eleventh Amendment immunity. *Amici* agree with Florida Prepaid and the court of appeals that "Florida Prepaid is engaged in an important governmental function; therefore, the *Parden* doctrine of waiver does not apply to the present case." Pet. App. 22a; Respondent's Br. 35-41. Therefore, neither Florida nor any other State has impliedly consented to suit in federal court by operating a prepaid tuition program.

Florida Prepaid should prevail even if the Court does not reach this issue, however. *Parden* itself makes clear that a State does not impliedly consent to suit when it continues to engage in an activity after Congress has clearly expressed an intent to subject States to federal court suit. In this situation, the State's initial foray into this area obviously cannot be deemed a waiver of immunity because at the time the State commenced the subject activity, Congress had not yet conditioned the State's participation

on its amenability to federal court suit. Under these circumstances, it is unfair and unreasonable to suggest that a State's failure thereafter to disengage from the activity constitutes a waiver of the State's Eleventh Amendment immunity.

In this case, the Florida Prepaid Postsecondary Education Expense Board was created by the Florida legislature in 1987 and began its prepaid tuition programs in 1988. Congress did not subject States to suit under the Lanham Act until 1992. Consequently, Florida Prepaid's failure to terminate its programs following Congress' election to subject States to suit under the Lanham Act cannot be deemed an "implied consent" by the State to federal court suit.

As the popularity of Florida Prepaid's programs indicates, *see* discussion *supra* at 7, States are simply not at liberty to abandon important and popular state programs merely because Congress elects, at a particular point in time, to condition state participation in a field upon the State's implied waiver of its Eleventh Amendment immunity. Such a view stretches the notion of "consent" beyond any reasonable limits. *See Johnson*, 304 U.S. at 464 ("A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.").

Parden itself articulates a legal standard that declines to find an "implied consent" to suit in a State's failure to terminate a program. The federal statute at issue in *Parden*, the FELA, was enacted by Congress in 1908. *See* 45 U.S.C. §§ 51-60. Two decades later the State of Alabama began to operate the Terminal Railway. *Parden*, 377 U.S. at 185. This chronology was central to *Parden*'s holding that the State had impliedly consented to suit: "Our conclu-

sion is simply that Alabama, when it began operation of an interstate railroad approximately 20 years after enactment of the FELA, necessarily consented to such suit as was authorized by that Act." *Id.* at 192.

Justice Marshall subsequently homed in on this feature of the *Parden* case to explain why he thought "the concept of implied consent or waiver relied upon in *Parden* approaches, on the facts of that case, the outer limit of the sort of voluntary choice which we generally associate with the concept of constitutional waiver." *Employees*, 411 U.S. at 296 (Marshall, J., concurring). He noted that in *Employees* the State of Missouri had been "fully engaged in the operation of the affected hospitals and schools at the time of the 1966 amendments" to the FLSA that extended its coverage to certain state facilities. *Id.*

> To suggest that the State had the choice of either ceasing operation of these vital public services or 'consenting' to federal suit suffices, I believe, to demonstrate that the State had no true choice at all and thereby that the State did not voluntarily consent to the exercise of federal jurisdiction in this case. In *Parden*, Alabama entered the interstate railroad business with at least legal notice of an operator's responsibilities and liability under the FELA to suit in federal court, and it could have chosen not to enter at all if it considered that liability too onerous or offensive.

Id. (citation omitted). "It obviously is a far different thing," he wrote, "to say that a State must give up established facilities, services, and programs or else consent to federal suit." *Id. See Close v. New York*, 125 F.3d 31, 40 (2d Cir. 1997) ("given that New York had employees before the enactment of the

FLSA and before it was made applicable to the States, its continued status as an employer cannot realistically be construed as a waiver of immunity") (footnote omitted); *Digiore*, 962 F.Supp. at 1075 ("[e]mployment is something 'in which all states were involved in long before the FLSA was enacted' ") (quoting *Close v. New York*, 1996 U.S. Dist. LEXIS 12330, at *4 (N.D.N.Y. 1996), *aff'd*, 125 F.3d at 40-41).

The United States argues that "a State may impliedly waive its Eleventh Amendment immunity by voluntarily engaging in conduct that Congress has clearly provided will subject the State to suit in federal court." U.S. Br. 14. Thus, it contends, "Florida Prepaid's sale and advertisement of investment products is properly regarded as an implied waiver of its immunity from suit in federal court." *Id.* at 21. In the view of the United States, it is irrelevant that the Florida legislature created the state agency in question five years before Congress enacted the TRCA and that the agency began offering prepaid tuition programs four years before the federal enactment.

As demonstrated by Justice Marshall's opinion in *Employees*, the United States' position is based on a very unrealistic notion of "consent." Justice Marshall emphasized just how far-fetched it is to say that "a State must give up established facilities, services, and programs or else consent to federal suit," 411 U.S. at 296 (Marshall, J., concurring), simply because Congress has subsequently elected to subject an area of state activity to federal regulation. As noted above, *see* p. 18 *supra*, the United States is itself not subject to any such notion of "implied consent" to suit and therefore need never negotiate this Hobson's choice.

The United States seeks to accommodate these concerns by arguing that "the State's waiver can be regarded as truly voluntary only if the conduct in question involves activities that the State can realistically choose to abandon," U.S. Br. 24, and that "[a] State does not voluntarily waive its Eleventh Amendment immunity by engaging in activities that it cannot realistically choose to abandon, such as the operation of a police force." *Id.* at 26.

This theory is unworkable and would improperly inject the federal courts into the determination of policy questions that are the province of the States' political branches. *Cf. Helvering v. Gerhardt*, 304 U.S. 405, 427 (1938) (Black, J., concurring) ("The genius of our government provides that, within the sphere of constitutional action, the people—acting not through the courts but through their elected legislative representatives—have the power to determine as conditions demand, what services and functions the public welfare requires."). As noted above, in the real world it will rarely if ever be possible for a State to "abandon" any program that is popular with the citizenry and on which citizens have come to depend. Certainly it is not a realistic suggestion in this case, in which the number of participants in Florida Prepaid's tuition programs had reached 375,546 as of 1996. *State College Savings Plans* at 11. Nor is it realistic to expect the federal courts to be able to identify those programs that a State can abandon.

In keeping with its theory, the United States argues that Florida Prepaid has impliedly waived the State's Eleventh Amendment immunity because, "[l]ike the railroad in *Parden*, the Board operates 'in the area where private persons and corporations normally ran

the enterprise.' " U.S. Br. 27 (quoting *Employees*, 411 U.S. at 284). Not only is this assertion incorrect factually, it demonstrates the unworkability of the United States' proposed legal standard.

Contrary to the statement of the United States, the Michigan legislature enacted prepaid tuition legislation in 1986.[8] *See Michigan v. United States*, 40 F.3d at 818. The Florida legislature enacted that State's legislation in 1987. And today—just twelve years after the establishment of the Michigan program, 22 States have prepaid tuition programs. *See* Conklin, *Federal Tuition Tax Credits* at 26-27; *see also* Appendix.

As a legal matter, *amici* question the premise of the United States that courts can be expected to identify—as a means of delineating the scope of the States' Eleventh Amendment immunity—those areas " 'where private persons and corporations normally ran the enterprise.' " U.S. Br. 27 (quoting *Employees*, 411 U.S. 284). This concern is supported by a pertinent example given by the Court in *Employees*, the very case cited by the United States to support its implied waiver theory.

In order to distinguish the facts of *Employees* from *Parden* (in which latter case "private persons and corporations normally ran the enterprise"), Justice Douglas reviewed the history of mental health care. *See Employees*, 411 U.S. at 284. Justice Douglas explained that whereas " '[b]efore 1810 " 'only a few

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[8] As College Savings Bank did not begin to sell CollegeSure CDs until 1987, Pet. Br. 6, it appears that Michigan began its prepaid tuition program contemporanously with, if not before, College Savings Bank.

eastern-seaboard states had incorporated private institutions to care for the mentally ill, and Virginia alone had established a public asylum' . . . after that the public sector took over." *Id.* (quoting D. Rothman, *The Discovery of the Asylum* 130 (1971)).[9] The emergence of States as the principal providers of institutional care for the mentally ill, after an initial period in which they scarcely did so at all, illustrates the profound difficulty of stating with assurance that a state agency is operating "in [an] area where private persons and corporations normally ran the enterprise." U.S. Br. 27.

Today, 47 States have either adopted or are seriously considering the adoption of a prepaid tuition or college savings program. *See* Conklin, *Federal Tuition Tax Credits* at 26-27. It is apparent that these state programs are becoming as integral to the States' provision of higher education as the construction of dormitories or the offering of classroom instruction itself.

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[9] A footnote in the Court's *Employees* opinion elaborates on this history in a way that provides a striking analogy to the emergence of state tuition assistance programs. *See* 411 U.S. at 284 n.2. The Court uses the Rothman study to demonstrate that while initially States did not provide care for the mentally ill, by the middle decades of the nineteenth century, "in a dramatic transformation, state after state constructed asylums . . . . By 1850, almost every northeastern and midwestern legislature supported an asylum; by 1860, twenty-eight of the thirty-three states had public institutions for the insane." *Id.* (quoting Rothman at 130).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

RICHARD RUDA *
Chief Counsel
JAMES I. CROWLEY
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 345
Washington, D.C. 20001
(202) 434-4850

* Counsel of Record for the *Amici Curiae*

March 24, 1999

APPENDIX

APPENDIX

SELECTED STATE STATUTES ESTABLISHING PREPAID TUITION PROGRAMS

Alaska Stat. § 14.40.803(a)

The Alaska advance college tuition payment fund is established as a nonlapsing fund of the University of Alaska. The fund is established for the purpose of enhancing the ability of the university to provide (1) higher education for the people of the state; (2) wide and affordable access to higher education for residents and their children; (3) an incentive for residents to achieve higher academic standards in grades 7—12; and (4) an incentive for residents to continue and complete secondary and post secondary education. The fund may be divided into separate accounts for accounting purposes.

Ark. Code Ann. § 6-62-902

In order to help make higher education affordable and accessible to all citizens of Arkansas, to maintain state institutions of higher education by helping to provide a stable financial base to these institutions, to provide the citizens of Arkansas with financing assistance for higher education and protection against rising tuition costs, to encourage saving to enhance the ability of citizens of Arkansas to obtain financial access to institutions of higher education, to encourage elementary and secondary students in this state to achieve academic excellence, and to promote a well-educated and financially secure population to the ultimate benefit of all citizens of the State of Arkansas, there is hereby created the Arkansas College Savings Program. The program shall consist of the sale of tuition credits and supplemental tuition credits.

110 Ill. Comp. Stat. 979/5

The General Assembly finds and declares that the general welfare and security of the State are enhanced by access to higher education for all residents of the State who desire that education and who demonstrate the qualifications necessary to pursue that education. Furthermore, it is desirable that residents of the State who seek to pursue higher education be able to choose attendance at the higher education institution that offers programs and services most suitable to their needs. Accordingly, endeavors that serve the higher education needs of the people of the State represent an essential function of State government.

During the past decade, students have been paying more and borrowing more to finance the increasing cost of higher education at Illinois colleges and universities as well as at similar institutions nationwide. Federal and state governments' capacity to fund college scholarships and grants cannot fully meet the current and future demand for higher education nor is it reasonable to expect that paying for college is solely a governmental responsibility. It is—and has always been—a shared responsibility among the student, the family, State government, and the federal government. Consequently, the intent of this Act is to both encourage and better enable Illinois families to help themselves finance the cost of higher education, specifically through a program that provides Illinois families with a method of State tax-free and federally tax-deferred savings for college tuition.

Md. Code Ann., Educ. § 18-902

It is the intent of the General Assembly to enhance the accessibility and affordability of higher education

for all citizens of the State by establishing a method to provide for the prepayment of tuition at institutions of higher education in the State.

Mich. Stat. Ann. § 15.2097 (422), § 2

The legislature hereby finds and declares the following:

(a) It is an essential function of state government to forever encourage schools and the means of education, as provided in section 1 of article VIII of the state constitution of 1963.

(b) It is a responsibility of state government to maintain state institutions of higher education as provided by section 4 of article VIII of the state constitution of 1963.

(c) It is an essential function of state government to encourage attendance at state institutions of higher education.

(d) Tuition costs at public institutions of higher education are difficult for many to afford and are difficult to predict in order to enable individuals and families to plan.

(e) It is in the best interest of the people of this state to foster public higher education in order to provide well-educated citizens.

(f) It is in the best interest of the people of this state to encourage state residents desiring a public higher education to enroll in state public institutions of higher learning.

(g) It is in the best interest of the people of this state to enhance and foster the ability of Michigan residents to choose an independent, nonprofit higher

education in order to provide well educated citizens and to encourage state residents desiring an independent higher education to enroll in an independent degree-granting college or university located in this state.

(h) Students in elementary and secondary schools tend to achieve to a higher standard of performance when the payment of tuition for their higher education is secured.

(i) Providing assistance to assure the higher education of the citizens of this state is necessary and desirable for the public health, safety, and welfare.

Miss. Code Ann. § 37-155-3

The Legislature hereby finds and declares as follows:

(a) Tuition and required fees at institutions of higher education are difficult for many to afford and difficult to predict. As a result, the ability of individuals and families to plan for future educational expenses has been adversely affected.

(b) It is in the best interest of the citizens of this state to foster higher education in order to provide well-educated citizens.

(c) It is in the best interest of the citizens of this state to encourage state residents to enroll in institutions of higher education.

(d) Providing a mechanism to help assure the higher education of the citizens of this state is necessary and desirable for the public health, safety and welfare.

(e) The purposes of this act are to:

(i) Provide wide and affordable access to the public institutions of higher education for the residents of this state.

(ii) Encourage attendance at institutions of higher education and help individuals plan for educational expenses.

(iii) Provide a program for the advance purchase of tuition and required fees as both a means and an incentive for the citizens of this state to provide for future higher education expenses.

(iv) Provide a program through which many of the costs associated with post-secondary attendance may be paid in advance and fixed at a guaranteed level for the duration of the undergraduate enrollment.

(v) Provide for the creation of a trust fund, as an agency and instrumentality of the State of Mississippi, to assist qualified students in financing a portion of the cost of attending institutions of higher education in the State of Mississippi.

(vi) Encourage timely financial planning for higher education by the creation of prepaid tuition contracts.

Ohio Rev. Code Ann. § 3334.02

(A) In order to help make higher education affordable and accessible to all citizens of Ohio, to maintain state institutions of higher education by helping to provide a stable financial base to these

institutions, to provide the citizens of Ohio with financing assistance for higher education and protection against rising tuition costs, to encourage saving to enhance the ability of citizens of Ohio to obtain financial access to institutions of higher education, to encourage elementary and secondary students in this state to achieve academic excellence, and to promote a well-educated and financially secure population to the ultimate benefit of all citizens of the state of Ohio, there is hereby created the Ohio college savings program. The program shall consist of the issuance of college savings bonds and the sale of tuition credits and, if offered, supplemental credits.

(B) The provisions of Chapter 1707. of the Revised Code shall not apply to tuition credits or any agreement or transaction related thereto.

24 Pa. Stat. § 6901.301

The General Assembly finds and declares as follows:

(1) Tuition at institutions of higher education is difficult for many to afford and difficult to predict. As a result, the ability of individuals and families to plan for future educational expenses has been adversely affected.

(2) It is in the best interest of the citizens of this Commonwealth to foster higher education in order to provide well-educated citizens.

(3) It is in the best interest of the citizens of this Commonwealth to encourage State residents to enroll in institutions of higher education.

(4) Providing a mechanism to help assure the higher education of the citizens of this Common-

wealth is necessary and desirable for the public health, safety and welfare.

(5) The purposes of this chapter are to:

(i) Provide wide and affordable access to institutions of higher education, both public and private, for the residents of this Commonwealth.

(ii) Encourage attendance at institutions of higher education, both public and private, and help individuals plan for educational expenses.

(iii) Provide a program for the advance purchase of tuition as both a means and an incentive for the citizens of this Commonwealth to provide for future higher education expenses.

S.C. Code Ann. § 59-4-10

This chapter may be cited as the "South Carolina Tuition Prepayment Program Act". The South Carolina Tuition Prepayment Program is established to assist the citizens of South Carolina with the expense of college by providing an advanced payment program for tuition at a fixed and guaranteed level for public colleges and universities.

Tenn. Code Ann. § 49-7-803

Article XI, § 12, of the Constitution of Tennessee manifests the intention of the citizens of this state that the advancement and improvement of higher education in this state is an essential governmental function and purpose of this state. Pursuant thereto, the general assembly hereby finds that the creation of

a trust program, as an agency and instrumentality of the state, to assist students or their families in financing a portion of the costs of attending colleges and universities will increase the number of students who will seek to attend a college or university, and will, therefore, advance and improve higher education in this state. It is, therefore, the legislative intent of this part to establish an educational trust fund as an agency and instrumentality of the state to assist students to pay in advance the tuition cost of attending colleges and universities, and thereby to encourage such students to attend a college or university. In establishing the trust program, it is further the intent of the general assembly to encourage timely financial planning for higher education by the creation of tuition contracts, and to provide assistance and incentives for the purchase of tuition contracts for the benefit of the children of the people of this state. It is the legislative intent that the tuition program be funded from fees assessed in accordance with § 49-7-805(10).

Tex. Higher Ed. Code Ann. § 54.6001

An educated population being necessary to the social development and economic health of this state, the legislature finds and declares it to be an urgent public necessity to assist young Texans in obtaining a higher education. Because the state's population is rapidly growing and is diverse, the state is required to use all of the higher education facilities and resources within the state, both public and private, to provide a wide variety of educational environments and instructional options and to preserve the partnership between the state and private or independent institutions of higher education. Therefore, the pre-

paid higher education tuition program is established to help Texas students attend the institution that best meets their individual needs.

Va. Code Ann. § 23-38.76.A

To enhance the accessibility and affordability of higher education for all citizens of the Commonwealth, there is hereby established as an independent agency of the Commonwealth, the Virginia Higher Education Tuition Trust Fund (the "Fund"). Moneys of the Fund shall be held in the state treasury in a special nonreverting fund, which shall consist of payments received pursuant to prepaid tuition contracts made pursuant to this chapter, bequests, endowments or grants from the United States government, its agencies and instrumentalities, and any other available sources of funds, public or private. Any moneys remaining in the Fund at the end of a biennium shall not revert to the general fund but shall remain in the Fund. Interest and income earned from the investment of such funds shall remain in the Fund and be credited to it.

Wash. Rev. Code § 28B.95.010

The Washington advanced college tuition payment program is established to help make higher education affordable and accessible to all citizens of the state of Washington by offering a savings incentive that will protect purchasers and beneficiaries against rising tuition costs. The program is designed to encourage savings and enhance the ability of Washington citizens to obtain financial access to institutions of higher education. In addition, the program encourages elementary and secondary school students to do well in school as a means of preparing for and aspiring to

higher education attendance. This program is intended to promote a well-educated and financially secure population to the ultimate benefit of all citizens of the state of Washington.

W. Va. Code § 18-30-2

The Legislature hereby finds and determines that the advancement and improvement of higher education in the state of West Virginia is a proper governmental function and purpose of the state. The Legislature also finds that the creation of a prepaid tuition trust fund, to assist qualified students and their families in financing a portion of the costs of attending an accredited higher education institution or program in the state of West Virginia will increase the number of qualified students who will seek to attend the accredited higher education institutions and programs, which will be of benefit to students, families and to the accredited higher education institutions and programs, and will therefore advance and improve higher education in the state of West Virginia. It is, therefore, the legislative intent of this article to establish a prepaid tuition trust fund to assist qualified students to pay in advance the costs of attending accredited higher education institutions and programs and thereby to encourage the qualified students to attend accredited higher education institutions and programs in the state of West Virginia. The Legislature finds and declares that prepaid tuition trust fund contracts neither contain nor obligate any general revenue funds.